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**Citation for published version:**

Mac Sithigh, D 2011, 'Legal Games: The Regulation of Content and the Challenge of Casual Gaming', *Journal of Gaming & Virtual Worlds (JGVW)*, vol. 3, no. 1, pp. 3-19. [https://doi.org/10.1386/jgvw.3.1.3\\_1](https://doi.org/10.1386/jgvw.3.1.3_1)

**Digital Object Identifier (DOI):**

[10.1386/jgvw.3.1.3\\_1](https://doi.org/10.1386/jgvw.3.1.3_1)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Journal of Gaming & Virtual Worlds (JGVW)

**Publisher Rights Statement:**

© The Author. Mac Sithigh, D. (2011) Legal Games: The Regulation of Content and the Challenge of Casual Gaming, in Journal of Gaming and Virtual Worlds, 3(1) pp 3-19. DOI: [http://dx.doi.org/10.1386/jgvw.3.1.3\\_1](http://dx.doi.org/10.1386/jgvw.3.1.3_1)  
Originally published online:  
<http://www.ingentaconnect.com/content/intellect/jgvw/2011/00000003/00000001/art00001?token=004d16630073637e442f2067217a762a702c496e6d7c7a7b687627504541676249266d656c116>

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This is a post-print of an article published by Intellect.

**Legal games: The regulation of content and the challenge of casual gaming**

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Journal of Gaming and Virtual Worlds

2011, 3(1): 3-19

doi: 10.1386/jgvw.3.1.3\_1

**Abstract**

The regulation of video games in the United Kingdom has come under the authority of the British Board of Film Classification since the 1980s, but the system was extended in 2010 and a new authority will take over from the British Board of Film Classification (BBFC) in due course. This article considers the history of this regulatory system, arguing that the limitations of the Video Recordings Act (VRA) (the governing statute) and the assumptions made by legislators are a result of the gulf between legal and academic understandings of games. Furthermore, the range of games now played, such as casual downloadable games and applications on smartphones and mobile devices, means that the dividing line between regulated and unregulated may be based on history instead of necessity. The author draws upon legal decisions, regulatory statements, and general and specialist press reports, alongside the academic literature on games from the humanities and the social sciences, arguing that an alternative form of legal control could be informed by advances in the academic and cultural understanding of video games.

## 1. Introduction

Press reports increasingly highlight the significance of video games in cultural and economic terms (e.g. Arnott 2009, regarding *Call of Duty: Modern Warfare 2* [Infinity Ward 2009]). Despite the vibrant academic work in game studies and the associated range of scholarly publications, there is a further dimension deserving some attention. This is the role of the law in the development of the wide range of games available in this age of a successful games industry, the theme of this article. In this context, the legal choices made (or avoided) by the UK Parliament will be considered, as a useful test of the relationship between the law and the industry and between regulators and gamers. Jesper Juul's recent assertion that 'to play video games has become the norm; to not play video games has become the exception' (2009: 8) also informs the topic of this article, as (1) the regulatory strategy may depend on the construction of the 'audience' and (2) the widening of forms of game-playing may challenge the existing definitions of what is and is not subject to prior regulation and classification.

The power of the law is not unfamiliar to gamers and the games industry. Video games have (since 1984) been classified in the United Kingdom by the British Board of Film Classification (BBFC) under the authority of the Video Recordings Act (VRA). The VRA deals with videos and DVDs and related physical formats, but not video-on-demand or indeed online games. However, the effect of the original Act was that the majority of games were considered to be 'exempt' and as not requiring classification. Systems of self-regulation also exist, dealing with exempt games for the most part, through a Europe-wide system, the Pan-European Game Information (PEGI). The Digital Economy Act 2010 brought about a major change to these systems, narrowing the scope of the exemption from classification and providing for the creation of a new games-specific classification authority. The UK model of regulation is not the only one, but it is an important one, owing to the success of the British industry, which had sales of £1.6bn in 2006 (Department of Culture, Media and Sport [DCMS] 2009), and particularly high growth rates of 10 per cent per year in respect of games, compared with only 1.8 per cent for movies and negative in the case of music (Alderman 2009). The high levels of participation are also pertinent, as the games market is the 3rd largest in the world, sales of consoles are by some distance higher than in any other EU state, and recent statistics suggest that over 70 per cent of the (online, aged 8+) UK population now plays video games, with the average time spent gaming (within that category) being five hours per week (TNS 2010a).

In this article, the regulation of the sale and supply of video games is considered in two ways. In the first section, the role played by the BBFC over the past quarter-century is considered. Following the changes to UK law approved by Parliament in 2010, the BBFC will no longer have a significant role in relation to games, but the history of how it dealt with games at various stages of the development of the industry remains valuable, not least because a number of themes appear again and again. Two themes are argued to have been dominant: loud disagreements in relation to violent games, and less obvious but nonetheless important challenges in relation to interactivity and multimedia games. However, the second section addresses a broader challenge, that of the role of formal legal control of games when the forms of game-playing are undergoing significant change. With the popularity of casual gaming and

games played within social networking both considered, the conclusion is that the purpose of legal involvement remains unclear and contradictory.

It is also contended that there are separate debates regarding video games in the worlds of legal regulation (classification) and of 'game studies'. Within game studies, legal issues may not always be to the forefront. For example, Dovey and Kennedy's (2006: 43–62) case study of the production of games, looking at the developer Pivotal Games, is broken down into economic, technological and cultural categories of analysis, and there is no discussion of legal or regulatory concerns having an impact on the production process. Typical explorations of video games for a student audience (e.g. Newman 2004) will consider the debate on video game violence, and possibly mention issues around copyright, but few will even refer to the BBFC or VRA. This is, based on the other work of these authors, clearly a reflection of the limited role of the Board and Act rather than any absence of knowledge. However, it should be seen as a recognition of the limited impact of statutory classification, and whatever explanation can be supplied is an illustration of a difference with fields such as television or film, where such a situation would be rare.

Indeed, this situation highlights the background to the discussions of the BBFC and emerging games that are emphasized in this article. It is the view of the author that the potential of alternative academic approaches to video games to revitalize and illuminate the lawmaking and classification processes has yet to be realized. The academic study of games is itself the subject of vibrant debates, with some arguing for an approach based on mediated and ludologist considerations, suggesting that some scholarship is hampered by the focus on narrative. It has become unexceptional for academic and popular approaches to video games to draw upon Huizinga's *Homo Ludens* (1950) as a starting point for research or analysis (e.g. Salen and Zimmermann 2004: 32; Poole 2000). More specifically, the idea of 'ludology' (game-based approaches), popular within the field as a term since 1999, is used to create some distance from narrative approaches (narratology), important in establishing video game studies as a distinctive field of research (Juul 2005: 16). However, consideration of ludology is extremely rare within legal scholarship regarding games, and unheard of in the parliamentary debates regarding the key pieces of video game legislation.

## **2. The BBFC**

It is necessary to be aware of the limitations of the analysis in this section, where the impact of the BBFC on video games is considered. A complete assessment of the BBFC's record is not yet possible, as very limited information on decisions is published, and the institution is not subject to the Freedom of Information Act. Recent decisions are accompanied by 'extended classification information', which sets out (in a brief fashion) the reasons for the classification decision, but files are only available for consultation by researchers when those files are at least 20 years old. Given the way in which games have developed, this effectively excludes all but a tiny fraction of classification decisions from external evaluation. Furthermore, although there have been a number of cases where BBFC decisions were challenged at the Video Appeals Committee (VAC), this has proven to be an infrequent occurrence. Decisions of the VAC are not widely circulated (some are reproduced or summarized in BBFC annual reports), but two important cases will be discussed in this section. Before doing so, however, it is appropriate to note the extent of regulation in the United Kingdom, and

then to explain the regulatory approach preferred in the United Kingdom, and how it compares with academic approaches to games.

Around 200 games per year are reviewed by the BBFC, after a significant increase in 2005 resulting from legal advice on ‘DVD-style’ material within games being non-exempt. However, this is much fewer than the 1000+ games normally assessed by the voluntary self-regulation system managed by the Video Standards Council (VSC), known as Pan-European Game Information (PEGI). This system is based on the original ELSPA ratings developed by the industry with the VSC. Half of the PEGI-classified games fall into the lowest (i.e. suitable for children) category. In the case of consoles (but not the PC), manufacturers require the use of BBFC or PEGI, and retailers also require some form of rating (Byron 2008: 163). The distinction between PC and consoles is that the many manufacturers of PCs (or indeed Microsoft, as developer of the Windows operating system) do not have meaningful control over the software that users can install, while console manufacturers maintain tight control over software development through the control of intellectual property rights. However, retailers and developers can and do use the system for PC games alongside console games. Aside from this, there are various multimedia complications associated with games, ranging from covermounted discs on magazines (which may mean that the retailer is susceptible to a VRA offence if selling it to an underage purchaser)<sup>1</sup> to the inclusion of multiple types of work on a single format (especially next-generation consoles and Blu-Ray discs).

Perhaps showing its roots in the statutory system for the control of video recordings, it is fair to say that the UK legislation applicable to video games falls firmly within the narrative tradition and (some elements) of theories of mediated approach, and certainly not the broader game-based approach suggested by scholars. This has not gone entirely unnoticed. In the recent ‘popular’ discussion of video games in Chatfield’s (2010: 9) *Fun, Inc.*, the author dedicates significant space in early pages to arguing that the ‘true fun’ of video games lies quite some distance from the visceral components (loud, violent, spectacular or sexual sound and images) of the game. An objective, all-encompassing reading of violence in a game is a difficult proposition. Games such as *Carmageddon* (Stainless 1998), discussed below, are argued, in ethical terms, to have ‘unethical affordances but [...] are not necessarily unethical – it depends on the player’s perspective and experience’ (Sicart 2009: 49).

Yet concerns over violence and addictiveness in games are not new. The first attempt to deal with the issue in the House of Commons was through a Private Members Bill with an unusual title, the ‘Control of Space Invaders and Other Electronic Games Bill 1981’. During the short debate on this proposal (which did not become law), the remarks of proposer George Foulkes MP focused on the obsession of young people and the need for licensing of arcades. It is interesting how the game that is argued to be an important breakthrough in bringing arcade games to mainstream venues (Burnham 2001: 182) is also the subject of Parliament’s first (albeit brief) consideration. Even earlier, though, the game version of 1975 movie *Death Race 2000* (available on the Atari as *Death Race* [Exidy 1976]) provoked concerns and was ultimately withdrawn (the first to be ‘pulled’ from the shelves [Bogost 2007: 200])

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<sup>1</sup> As considered in *Harrow LBC v WH Smith* (2001) EWHC Admin 469..

despite the very abstract ‘gremlin’ characters that players had the chance to kill (Montfort and Bogost 2009: 125; Loganidie and Barton 2009: 197–98). This game, and subsequent controversies such as that regarding the horror-style *Night Trap* (Digital Pictures 1993), are considered important elements in the development of the self-regulatory Entertainment Software Rating Board (ESRB) in the United States (Burnham 2001: 139, 159).

As the BBFC argued as far back as 1998, applying general media research to video games does not resolve the problem of limited research on games (BBFC 1998), particularly in the light of the paucity of longitudinal studies and the short shelf life of many games and platforms. However, the debate on media violence more generally is confidently described as ‘over’ (Anderson et al. 2007: 4), with the same authors setting out a ‘general aggression’ model, and arguing that this model predicts and explains the relationship between violent video game effects and aggression (Millwood Hargrave and Livingstone 2006: 137–40). Even if this research is accepted (and some do not accept it, notably Cumberbatch [2001: 20–21], who has criticized the work of Anderson and his colleagues on a number of occasions), the link between the findings and particular legal approaches is not as obvious as it is assumed. Participation in sports, for example, can be associated with aggression, but is treated in a different way by the legal system.

A related argument is that of the similarity between game skills and problematic real-life skills. Grossman, for example, has argued that ‘every time a child plays an interactive video game, he is learning the exact same conditioned reflex skills as a soldier or police officer in training’ (2001, in Newman 2004: 65; Thompson 2002). We will return to this point below. For now, it should be noted that there is also a significant issue with the evidential base that is at the forefront of these discussions. The approach associated with behavioural psychology that looks for the harmful ‘effects’ of media is far from the only one. The most comprehensive collection of alternative scholarship is found in Barker and Petley’s *Ill Effects* (2001). Indeed, Petley himself made an impassioned but ultimately fruitless plea, in correspondence with a House of Commons Committee preparing a report on ‘harmful content’ on the Internet and in video games, that the Committee should draw upon this wider academic tradition. To a limited extent, the division between the approaches of researchers – and the underappreciated development of social scientific approaches in the United Kingdom – is noted in the Byron Review (2008: 146). Even in this case, though, the idea of ‘games as a cultural topic’ is dealt with and not developed in a short paragraph in the final report (2008: 156).

The issue of violence has also been at the heart of the small number of legal disputes regarding BBFC decisions. In the *Carmageddon* case (Tambini et al. 2007: 212; Robertson and Nicol 2008: 840–41), the VAC ruled that the ‘original’ version of the game was non-exempt, but could be classified at 18 (with a parental lock) (Video Appeals Committee 1997). The driving/demolition derby game – where bonus points were awarded for ‘killing’ pedestrians and animals (a maximum of 16,474, apparently) – was initially refused classification by the BBFC. The game came as somewhat of a shock to the BBFC, which expressly repudiated earlier optimistic comments about game violence being ‘more like a game of ping pong than a bloody battle’ (BBFC 1996: 18; BBFC 1997a: 8). The VAC took article 10 of the European Convention of Human Rights into account (noting that the then-Human Rights Bill

would soon be applicable). In a split decision, it relied on arguments such as the game being a ‘fantasy game’ where the blood was ‘a bad joke but nevertheless a joke’ and – in a passage that seems very dated – that the game could only be played on the more adult PC rather than a widely used console (adults are reluctant to let their children loose on such an expensive piece of machinery as a computer). The wider circumstances of the case are also interesting. The VSC (then a body with self-regulatory functions only) strongly defended the game, while the majority of the BBFC’s own consultative body (the Video Consultative Council) disagreed with the VAC’s decision to classify it (BBFC 1997a: 45–46). There were two versions of the game available – the original version, and a ‘zombie’ version with green gunge instead of red blood. The latter was available (with a voluntary rating of fifteen) but an additional ‘splat pack’ could be downloaded from the Internet to ‘convert’ it back to the original (BBFC 1997b: 4). Beyond this, though, all concerned recognized that the decision would set an important precedent. A number of games including the original *Grand Theft Auto* (DMA/Rockstar 1998) were delayed approval pending the *Carmageddon* result, but were subsequently classified at 18 (BBFC 1998: 12). The red/green distinction (in terms of the difference between 18 and lower ratings) continued to be familiar to gamers for many years after it. However, the reliance on the status of the PC turned out to be a somewhat inaccurate one. Finally, just as *Carmageddon* was the apparent heir to the *Death Race* tradition (Burnham 2001: 177), further games were launched, such as a sequel to *Carmageddon*, *Carpocalypse Now* (Stainless 1998). This game provoked further controversy, and another parental lock and splat pack, but after some consideration it was classified at 18 (Burgess 1998; BBFC 1999: 14). On this occasion, this decision was not the subject of further legal proceedings.

The other argued case (about *Manhunt 2* [Rockstar 2008], an adventure game in which various violent acts are depicted) went as far as the High Court.<sup>2</sup> It was not the first VAC decision to be the subject of judicial review,<sup>3</sup> but it was the first video game decision to be so treated. The VAC overruled the decision of the BBFC to refuse to classify *Manhunt 2*, and the BBFC in turn made the application for judicial review. This was in fact a revised version of the game, as the first version had also been rejected but not appealed. The High Court found that the VAC had made an error of law in interpreting section 4A of the VRA, placing insufficient emphasis on the harm that may be caused to those likely to view the game in question, and quashed its approval of the game. The decision does illustrate the difficulties in assessing video games, but ultimately the VAC (on further consideration) still approved the game after applying the revised legal test (BBFC 2008: 94; Waters 2008) and the BBFC classified it at 18. Nonetheless, the delays to the release of the game and the initial refusal of the BBFC did contribute to the industry’s calls for a change to the system of regulation, as ultimately expressed in the 2010 amendments to the VRA. However, it is important to note that the assessment of the regulation of gaming should not be

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<sup>2</sup> *R (BBFC) v Video Appeals Committee* (2008) EWHC 203 (Admin).

<sup>3</sup> In fact, the status of the ‘first’ is difficult to ascertain. It is one of Bare Behind Bars (papers filed but withdrawn just before the oral hearing (BBFC 1996: 23–25; BBFC 1998: 41), *Visions of Ecstasy* (heard at the European Commission of Human Rights and European Court of Human Rights without judicial review in the United Kingdom: *Wingrove v UK* [1996] 24 EHRR 1) or the group of seven R18 videos considered in *R v Video Appeals Committee ex parte BBFC* (2000) EMLR 850.

confined to that of the acceptable level of violence, despite the predominance of this question in the published and argued legal decisions. The broader principles of the legislation and the potential for incorporating other approaches to games must also be considered.

### **3. Interactive, multimedia and film**

In the context of various critiques of the role of the VRA, it should also be noted that video games scholarship itself is at an advanced stage, having dealt with the ‘fundamental distinction between narratology and ludology’ for some time and now established as a relevant discipline (Arceneaux 2010: 161). This is a helpful reminder of the need to understand the gaming experience as compared with the legal approach to games. Nitsche’s analysis of video games uses five categories to understand the many dimensions of gaming (2008: 16): rule-based space (the mathematical or mechanical aspects of the game), mediated space (the image or screen), fictional space (imagination of the player), play space (including the player and control devices) and finally social space (interaction with others, particularly in online gaming). Salen and Zimmermann (2004: 6), in a text focusing on game design, suggest a three-way division between rules, play and culture. However, we can see that there are different legal considerations relating to these spaces. For example, the rule-based space is strongly influenced by the designers of the console, who can encourage or prevent particular forms of game-playing through the design of the computer and liaison with game designers. The online interaction is clearly affected by norms of online communication, and also by the policies of broadband access or restriction (providing a useful link with ongoing consideration of network neutrality and the role of the ISP). The VRA is targeted at the mediated space but with a justification that would suggest it is designed to have an impact on the fictional space.

Is it possible for legal drafting to capture some of the alternative approaches to gaming? In fact, we can turn to the regulation of other areas of entertainment for a possible solution. One theoretical articulation of the qualities of games is that of Juul (2005: 36), who proposes a definition based on rules, variable and quantifiable outcomes, value assigned to possible outcomes, player/emotional attachment to outcome, and negotiable consequences. This is very clearly expressed as a non-technological definition. Its closest legal cousin can be argued to be not the law of video games, but instead the Gambling Act 2005, which defines games of chance (a type of gaming, which along with betting and lotteries makes up the definition of gambling) as including various practices such as a game involving ‘an element of chance and an element of skill’ but not ‘a sport’. The other side of this package is the articulation of three ‘licensing objectives’, in this case preventing crime and disorder, ensuring fair and open gambling and protecting children and other vulnerable persons. It is at least an interesting and different model for State intervention, particularly where the purpose of the 2005 Act was to remove a range of limitations and facilitate high-level light-touch regulation (e.g. of providers and of services rather than individual machines and games). Nonetheless, it should be noted that gambling remains a more regulated activity than games in many ways, with licensing schemes and a full statutory commission responsible for monitoring and enforcement.

On the other hand, the BBFC points to a number of situations where the interactivity requires more careful regulation than in the case of video. There is no explicit



statutory instruction to this effect, but the BBFC would maintain that it is judging the ‘harm’ of the reviewed product in accordance with the VRA as amended. So to cite a number of examples, the BBFC notes that

- As a result of the ‘lack of research’ and the ‘rapid developments in the sophistication of video games’, a more cautious approach may be taken in borderline situations (BBFC 2009a: 19).
- A stricter approach to ‘interactive sexual activity’ is likely to be used, given the ‘complicity’ of game players and the ‘consequent capacity for offence’ (BBFC 2009b: 11).
- Due to the ‘non-linear nature of many games’, language is a particular problem due to the way that it may be repeated ‘at the will of the player’ (BBFC 2009b: 11).

All of these points show, at least on the face of the guidelines, a particularly cautious approach, but also a contestable understanding of the nature of game-playing. Just as it has been argued that video games are complicated to study, due to the difficulty of game-playing, the non-linear nature of many games and the time required even to view all aspects of the game and other factors (Wolf 2008: 22–23), legal control of game content must also be affected by these aspects of gaming. It is not surprising in this context that film-like content such as cut scenes or full-motion video take on what may be a disproportionate role in classification (Mac Síthigh 2010). Indeed, Chatfield’s argument that while video games are powerful, they are ‘more so in many ways than either television or film, although not as transforming as the written word’ (2010: 57) is interesting in so far as it positions videogames between TV/film (subject to various comprehensive regulatory regimes) and print (very little modern-day regulation), while suggesting that the latter rather than the former is more transformative.

Others compare the reaction to video games with the reaction to controversial young adult literature in earlier generations, which had even been compared to the phenomenon of underage drinking (Edery and Mollick 2009: 25) and a long-running ban on pinball in New York (Juul 2005: 21). This point has particular force if we consider the weak legislative involvement with the contents of literature and the playing of games like pinball in the present era. Along similar lines, Bogost suggests that games relate to ‘representational goals akin to literature, art, and film, as opposed to instrumental goals akin to utilities and tools’ (2007: 45), but the division between the legal regulation of representational and instrumental activities is not a clear one, and some of the criticisms of video games (e.g. regarding player safety) are also accommodated within the latter. In addition, with a noticeable increase in the development of ‘co-creative’ games (Dovey and Kennedy 2006: 122–23) having a similar impact on games as user-generated content is having on broadcasting, the relationship between user-led and industry-led development is somewhat less obvious than it would have been at earlier moments in the history of video games (see also Newman 2008: 163–68, 176–77; Banks and Potts 2010).

A further complication, closely related to interactivity, is the idea of a game as a form of audio-visual media. Certainly, conventional forms of television are now suitable for forms of audience interaction through digital platforms, meaning that it is not unreasonable for a game to be part of an ostensibly ‘broadcast’ environment.

However, the new European Union framework for regulating TV and TV-like services, the Audio-visual Media Services Directive (AVMSD), contains a key provision in recital 18 that sets out some exclusions from the Directive, including private correspondence and ancillary animations on websites. For present purposes, the important exclusions are of ‘games of chance’ and ‘online games’. One interesting element of the Directive is that it takes the more general approach that there is no distinction between ‘online’ and ‘offline’ media, with the two systems of regulation being defined as television (linear, but through any platform including streaming TV on the Internet) and on-demand (non-linear, again including a range of possible platforms). This can again be compared with the VRA, where the distinction between physical and online supply remains – even after the changes in the Digital Economy Act – at the heart of the statutory scheme. Importantly, as a result of recital 18, the EU legislation does not prevent the use of national regulation of online games, subject to general rules of European law. An example of this is in the case of the other form of entertainment excluded from the AVMSD, namely games of chance. Such games remain subject to national regulation, through instruments like the Gambling Act in the United Kingdom (which even includes specific provisions for ‘remote gambling’, that is, gambling through a website). A limitation is provided by the European Court of Justice’s ability to find that protectionist measures violate the fundamental economic freedoms of the European Union.<sup>4</sup>

Three final points can be noted with reference to the overlap between games, broadcasting and other forms of regulation. First, the ambiguity of games in terms of status as goods or services is relevant. The regulation of gambling in Europe as an exception to general free movement principles has depended in part on its status as a service, where member states of the European Union have (slightly) more scope to take a national approach than would be possible in the case of goods. At an international level, too, the General Agreement on Trade and Tariffs applies to a wide range of states in respect of goods, whereas the newer General Agreement on Trade in Services depends on specific market access offers or commitments being made by states. To date, games (like films) are predominantly goods, not in the services category like television and radio, although the development of new forms of gaming as discussed below may bring about a reassessment of this position. Second, the possibility of there being some conflict within the terms of the AVMSD remains, not least where an on-demand audio-visual media service includes interactive components that some might understand as a game – or, vice versa, where a game includes material that would, if presented alone, be the subject of regulation as on-demand audio-visual media services. Finally, it is important to appreciate how the regulation of one service can affect the editorial decisions in another. In the case of the regulation of television in the United Kingdom, the regulator Ofcom uses its powers to control the display of web addresses on television channels that provide direct or near-direct access to material that would violate its Broadcasting Code if the said content had been included in the television service (Ofcom 2009: 8–12).

Considering the various forms of game discussed in this section, the existence of different methods of playing and delivery, a point not addressed in the amendments added to the VRA in 2010, is a challenge to the justification for State intervention.

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<sup>4</sup> A recent example being *Liga Portuguesa de Futebol Profissional v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, European Court of Justice, case C-42/08.

These amendments were concentrated on extending the regulatory scheme to a wider range of content within an unamended and technologically specific definition of games, without any thorough evaluation of the need for legislative control or the impact of a plurality of regulatory methods for games as broadly defined. For as long as this continues, other legal provisions such as those pertaining to broadcasting and gambling may have a direct or indirect effect on the games sector. One could stop here and consider the implications of this alleged failure, but while this debate has been going on, further developments in gaming have provided another challenge to the stability of legal control. These developments relate to casual and other forms of currently popular gaming.

#### **4. New directions: Casual, social and mobile**

Casual gaming is not entirely a creation of the twenty-first century. Some suggest that *Tetris* (Nintendo 1989) paved the way (Loganidie and Barton 2009: 291), and that the PlayStation contributed to a move towards casual gameplay (Newman 2004: 51). However, Juul argues (2009: 5) that there are two trends in the modern 'revolution' of casual games: mimetic interfaces and downloadable games, a shift from *video* games to *video games* (2009: 131, original emphasis), which will be addressed in turn.

An example of a game falling within the first of Juul's sub-categories, but of less relevance to this article, is *Guitar Hero* (Harmonix/Red Octane 2005) and its sequels, where the player 'mimes' playing a guitar. The concept of casual gaming is, in its mimetic iteration, particularly associated with the Nintendo Wii. This console is said to have expanded the 'gaming population' (Inoue 2009: 24), with a significant 'switch' of spending, particularly within families, towards this category (British Video Association 2009: 96).

While it has been argued that the marketing of the PlayStation 3 draws upon its photorealism and ability to play high-quality video, even the basic menus of the Wii are distinguished by a cartoon-influenced mode of presentation (Chien 2007). The success of the latter could be a further challenge to the film-focused approach to video games in UK law. However, even the mimetic dimension of the Wii itself has already come in for criticism, albeit not yet from the BBFC. The basis for this is that the stabbing and bludgeoning controls for the already-controversial *Manhunt 2* directly mimic the action itself (Densley 2008), a particularly powerful criticism given the focus on imitation and teaching techniques in the VRA, and the Grossman critique of 'learning' undesirable behaviour discussed above. However, this criticism of the Wii remains unpersuasive, as many Wii games use other physical actions without the visual content of *Manhunt 2*. Indeed, other unregulated real-world activities, like football, use and encourage 'dual use' physical actions that are capable of highly dangerous applications in a different context.

The second category, downloadable games, comprises a large number of short games purchased online, although over three-quarters of casual online/mobile games are in fact played without charge (TNS 2010b). Short games have also been found as preinstalled games available to a very wide range of users, such as the puzzle games *Minesweeper* (Microsoft 1992, incorporated into various versions of Windows) (Newman and Simons 2007: 128) and *Snake* (Nokia 1998) on Nokia mobile phones (Newman and Simons 2007: 194–96). Both legal and non-legal definitions continue to struggle with this category. The authors of a 2002 guide, for example, omitted

handheld games on the grounds that the player experience was not comparable to consoles and the PC (Berens and Howard 2002: 3). In general, though, handheld devices still used a form of technology that engaged the VRA on the same basis as games used on consoles and computers.

The games discussed by Juul, however, are based on downloads or online play alone. Indeed, the idea of browser-based online play (Juul 2009: 148–49) (with no ‘download’ or indeed sale), again using relatively simple and widely available systems, can cause further problems, as it means that even an extension of the VRA or equivalent provisions to ‘download’ may not fully capture this sub-sector. Another analysis (Ihamäki and Tuomi 2009) also highlights the importance of ‘cross media games’, referring to geocaching (hiding and finding locations and items with the assistance of GPS devices) and interactive TV where a non-TV technology such as a mobile phone is used as a return path. Both case studies blur the boundaries of games and are clearly outside the realm of video game law in the United Kingdom. Geocaching is difficult to define as a game of any sort (although it may well raise other interesting issues about risk, liability and access). Indeed, 2010 has seen the remarkable initial success of ‘location-based’ applications such as *Foursquare* (Pollack 2010), a further development that uses the location facilities of devices like iPhones to allow users to engage in activities such as competing for titles like the ‘mayor’ of a location, based on the number of times they have visited it. Meanwhile, some interactive games, particularly of the type discussed by Ihamäki and Tuomi (2009), have been dealt with through their status as a form of broadcasting, as ‘quiz participation TV’, considered as teleshopping under EU law<sup>5</sup> and section 10 of the Broadcasting Code in the United Kingdom.

In the United Kingdom, online games (whether played online or downloaded) are not covered by the VRA, even if the game contains the exact same features and gameplay as an equivalent game supplied on disc or other physical medium. The application of existing law to online games is still in its early stages around the world, with a particularly vigorous debate being that found in Australia. There, it is suggested that online games may be the subject of regulation (Moses 2009), either as part of the extensive system of games censorship or the evolving rules on the regulating of Internet content in that jurisdiction (Apperley 2008; Simpson 2008). Nonetheless, the absence of statutory regulation in the United Kingdom and in most jurisdictions should not be read as a statement that emerging forms of gaming are ‘unregulated’, as intermediaries such as web hosts and platform managers may play an influential role in controlling access to and use of games.

The market for games on social networking sites and on devices like the iPhone is an important one, and it was suggested that it would double to \$800 million in 2010, with a further doubling expected in 2011 (Keegan 2010). Games and entertainment are the most popular categories (Chatfield 2010: 213). The body that classifies games under the self-regulatory system in the United States, the Entertainment Software Ratings Board (ESRB), has suggested that its system should be used for games in the App Store (Terdiman 2009). The practice adopted by Apple, though, is to use its own classification process and a secret license agreement (not officially available, but

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<sup>5</sup> According to the decision in *Kommunikationsbehörde Austria v Österreichischer Rundfunk*, European Court of Justice, case C-195/06.

subject to various leaks, e.g. Siegler 2009; von Lohmann 2010), with the ability to place ‘parental controls’ on the device. This process itself has become extremely controversial, with some situations arising in 2009 regarding literature about sex (Johnson 2009) and a ‘baby shaker’ game initially approved but subsequently removed (Arthur 2009). Apple recently changed its policy and tightened the control on applications (Wortham 2010), which of course are only available (for non-specialist users) through the App Store, meaning that Apple has a powerful – and unconstrained – position beyond that of some statutory bodies for video games. With the launch of the iPad, further problems arose regarding Apple’s policies on appropriate content. Even an application based on James Joyce’s *Ulysses*, no stranger to censorship at the time of its first release as a work of literature a century ago, found itself the subject of restrictions imposed by Apple (Naughton 2010). The ability of the new system of iPhone applications (and similar) to be used for various controversial purposes echoes the concerns about game-based pornography expressed by the then-BBFC director as far back as 1993 (Ferman 1993). It also echoes the deliberate decision of Nintendo to develop the Nintendo Entertainment System (NES) as a family-friendly console with significant restrictions in its early days of any depiction of drugs, ‘foul language’, smoking and alcohol (e.g. Arsenault 2008: 111).

In a 2006 classification of the segments of what she terms digital games, Kerr (2006: 53–54) argues that the fourth sector (alongside console/handheld, PC and virtual worlds/massively multiplayer online games) is ‘mini’ games, further subdivided as Internet, mobile and digital television. These are useful categories in their own right, and from a legal point of view, all three subcategories attract different legal attention. Although not the focus of this article, games played through digital television may (in certain circumstances) be regulated through broadcasting law – particularly where the game is not truly interactive and relies on a mixture of broadcasting and viewer participation. As noted above, games available on the Internet are not (in general) the subject of regulation. In respect of mobile games, the Byron Review notes that such are perceived to be relatively innocuous (Byron 2008: 200), being subject to the Independent Mobile Classification Body (IMCB) except if the game is available on the open Internet and accessed through 3G Internet or WAP. Already, though, successful casual gaming developers such as Gameloft are seeing the majority of their games available through application stores rather than mobile operators (Screen Digest 2010). This shift from mobile operators to the Internet reduces the influence of the IMCB, but may bolster the power of parties such as Apple as managers of App Store-like services.

Beyond Kerr’s (2006) analysis, though, games have also become important within social network sites such as Facebook. Indeed, it is argued that such ‘social games’ compare favourably with ‘traditional’ online video games, as social games played on social network sites can be played with real-world friends already linked to the user’s profile (Rossi 2009). The CEO of the developer of some popular games like *Pet Society* (Playfish 2008) and *Restaurant City* (Playfish 2009), points out that these games represent a ‘tectonic shift in how games are marketed and discovered’ (Lovell 2009). The business model here is quite interesting, as the games tend to be made available without charge, supported by a combination of advertising and small payments made by players for features within the game (virtual gifts and virtual goods). Social gaming is more akin to a service than a product (Chatfield 2010: 34), despite the persistence of the product-based model in video games more generally.

Furthermore, criticism of censorship by the platform provider has already emerged (Juul 2009: 218), along similar lines to the developing critique of the power of web hosts as intermediaries in the 'web 2.0' era (Kreimer 2006; Mac Sithigh 2008; OpenNet Initiative 2010). These observations regarding games within social networking sites on censorship, advertising and availability are shared with the position of casual gaming as discussed above, in that the regulatory environment for these formats is demonstrably much less stable than that in respect of conventionally delivered console and PC games.

## **5. Conclusion**

The UK government has, over the past decade, developed a range of policies and strategic plans regarding the 'creative industries' (e.g. Creative Industries Task Force 1999; Department for Culture, Media & Sport 2008). Notably, video games are in a small category within the creative industries, in so far as prior regulation of content is concerned. Other sectors such as music, art, fashion and radio may be the subject of some legal control, but not in advance of release to the public. Despite the deregulation or proposed deregulation of other industries (such as television broadcasting), and the adoption of a regulatory system more acceptable to the games industries, we can see that the result of the 2010 changes to video games regulation will be the prior regulation of more games than ever before. It is therefore surprising that the fundamental question of how and why games should be regulated is given so little attention. Nonetheless, it is contended here that the engagement between law and video games is also clouded by a broader issue, that of the absence of ludology in the legislative and political processes. Should the United Kingdom continue to regulate games, as appears very likely, there may still be an opportunity to rethink the purpose of legal control, not to mention the assumptions made about games and game-playing.

Moreover, the case for using law to limit the development of video games is also affected by the diverse ways in which people now play games, including through methods not contemplated by current legislation. Juul's 'casual revolution' has very serious implications for regulation. This is not to say that public authorities are powerful, nor is it to suggest that decisions should be technology-driven, but it will become very difficult for those favouring prior regulation to justify this when fast-developing areas fall outside of this complex system. At present, it does appear that the private managers of unregulated areas are engaged in alternative forms of regulation, which itself deserves further attention. Where games have moved away from linear forms of audio-visual media in the past, regulators have struggled to understand and manage this challenge, again influenced in part by the statutory assumptions regarding film and video. Instead, the dominant theme over the history of video game regulation in the United Kingdom, and the most debated issue during the recent reforms, has been that of violence and the protection of children.

Undoubtedly, there are sound reasons to debate the impact of games in Parliament and to consider whether the public interest would be enhanced through a particular form of regulation. The purpose of this article has been to situate the desire of elected representatives to 'protect' in a wider context that could revitalize the legal control of games and game-playing, rather than to dismiss them out of hand. For sensible legislators faced with technological change, the most appropriate approach is to go 'back to basics' and articulate the purpose of regulation, an approach not taken in the

UK Parliament during its most recent debates. If the regulation of games is to be meaningful in the next decade, parliamentarians need to give serious consideration to the cultural meanings of games and the diversity of the games sector, including the question of casual gaming. If this were to happen, the resulting legislation should look very different to the VRA. The piecemeal, inconsistent approach to amending it seen over the past year is far from the optimal use of parliamentary time and attention.

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